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"Accelerating the arbitration procedure – settlements, delivery and admitting evidence"

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1. Introduction

One of the most important properties of the arbitration procedure, if not the most important, is the efficacy of that procedure in comparison to regular court proceedings.

Efficacy of the arbitration procedure can further be defined as the quality of the decisions passed, the executability of those decisions and, no less important, the speed at which the decision was made in the arbitration procedure.

It could be concluded that the first element, quality of the decision, has in principle never been contested among the parties in the arbitration.

This is because the quality of the decision depends predominantly on the quality of the application of the material norms, and is not doubted *a priori* due to the nature of the arbitration process itself, the reputation of the arbitrator and the specific, concentrated procedure.

The second element, executability of the decision, also in and of itself must give good results.

This is because the party losing the case can be expected to have a much greater readiness to execute the order from the decision without further seizures, because the party itself chose this procedure through its own explicit will, without the force of law.

If we accept the above conclusions as regular and rational, the third element that determines the efficacy of the procedure, the speed of the procedure, is not guaranteed in and of itself, and therefore I feel it necessary to actively address this element.

Furthermore, I am convinced that the speed of the procedure in the area of process law always offers room for improvement.

It is interesting to observe that no parties in either court or arbitration procedures would ever complain that their procedures have been carried out "too quickly".

If the parties are satisfied with the decision and accept the same as proper, it can never be premature, only late.

If one of the parties is not satisfied with the decision, this will not be due to the reason that the decision was made too quickly; instead the reason could be a different legal interpretation or violation of a right.

Therefore, any steps taken to further accelerate proceedings are always welcome.

The speed of proceedings, and in particular the speed of passing the decision and the final verdict as the objective of the arbitration procedure, cannot be an independent objective. Instead, that objective should be very carefully conceived in relation to the two requirements that are often in conflict with the speed of proceedings, which are:

- possibility of the parties to fully use their rights
and
- legality and comprehensiveness of the established state of facts.

Therefore, speedy proceedings are not always desirable, only in cases where it can meet the above requirements without causing damages.

If we try to understand the expectations of clients who are prepared to entrust their case to arbitration instead of going to court, it is likely that we can expect a fast procedure to be very high on the list, perhaps often at the top of the list.

I believe that I have sufficiently stressed the importance of the speed of the proceedings for the assessment of the quality of the arbitration proceedings in this introduction, and below will provide several recommendations for the process procedures to that aim.

2. Acceleration of the procedure using existing norms

There are three procedural institutes that I believe could be (with sufficient elaboration) applied very effectively towards accelerating procedures:

a) – Right to settle
b) – Own delivery
c) – Preclusion of evidence

Above all, I believe that the recommendations for accelerating the procedures explained here could be applied pursuant to Article 18, especially paragraph 2 of the Arbitration Act, which permits the arbitration court to “implement the proceedings in a manner it deems appropriate, and to independently determine the rules of procedure”.

Therefore, these recommendations, if accepted, could be applied without any amendments to the Arbitration Act or the “Zagreb Rules”, which I deem to be the most important aspect of this topic, as these elements can be implemented without any future normative action. I also believe them to be in compliance with the provisions of Articles 20, 21 and 22 of the Zagreb Rules, which regulate this area.

Unlike regular courts, the Arbitration Court has the right to formally determine and prescribed its rules of procedure, in which it is important to ensure that they do not conflict with the already stipulated rules.

If any of these rules in practice were to be stipulated more often and successfully applied, it is possible that they could then be suitable in creating norms, within the framework of the abovementioned laws.

In order to inform clients in the procedure of which additional rules will be applied in a transparent and timely manner, I believe that this should be in the form of a decision.

Such a decision would be delivered to the plaintiff after filing the suit, with a special invitation to supplement the suit as deemed necessary due to these additional rules.

The defendant would receive this decision with the delivery of the response to the lawsuit, without special warning of the additional rules, as such a decision is received prior to taking the initial action, unlike for the plaintiff.

3. Recommended additional rules of procedure

Ad a) – Right to settle

Commencing from the fact that speed is one objective, and the satisfaction of both parties another objective, the conclusions arises that it is necessary to motivate parties to settle in a simple and fast manner, as this necessarily includes both objectives.

I have intentionally called this recommendation “right to settle”, as the word 'right' suggests to clients that this is something that they should not miss out on, an opportunity not to be lost.

I propose that one of the points of the decision determining the additional procedural rules should invite the parties to state during the preclusive period or prior to the start of the evidence procedure, whether or not they agree to attend a hearing for the purpose of attempting to settle.

In this respect, I hold it important to immediately set that such a hearing would be held only once (as the objective is speed), that no records be made at the hearing and, in the event of a failure to settle, that no one may refer to anything stated at that hearing. The hearing may only be held if attended by both parties, by persons authorised to sign a settlement.

The same invitation would also list the scheduled first main hearing, scheduled in the event that a settlement is not made, to assure parties that the settlement hearing will not slow the overall procedure.

The above are technical circumstances which, from my experience, have been the main reasons for a poor turnout to conciliation hearings before the regular courts, which parties would only be made aware of those rights at such a hearing.

In other words, were parties to be previously informed of the key characteristics of such a hearing in advance, i.e. in the invitation, it is very likely that the turnout would have been higher.

Also, as will become evident from the explanation below, this “right” truly has a defined period in which it can be used, while the consequences of non-use further guide the party towards its use.

Furthermore, I would certainly suggest the use of the word “settlement” and not “conciliation” for even the use of the term contributes to its success. When dealing with commercial cases, the participants are not at ends with one another, which would suggest a private relationship, but are disputing a legal aspect of their relations.

For the sake of speed, the attempt to settle must be timed at the beginning of the procedure.

From my experience, any attempts to settle, either prior to the court case or after execution of the evidence procedure, is contradictory and removes any change of reaching a settlement solution.

Therefore, I believe that the timing of when to try to settle is an important element in improving the changes for reaching a settlement.

If an attempt is made to settle prior to the start of the case (various different forms of conciliation prior to the case are common), then it remains an open issue between the parties as to what and how to sue, with precisely which arguments and which ultimate request.

Uncertain facts of the actual requests and the actual response to these requests reduce the possibility for explanation and reaching an agreement.

If the attempt to settle is made after execution of the evidential procedure (or a majority of this procedure), the parties have opened more points of dispute through their arguments and evidence than they previously had, which hinders reaching an agreement. The exception could be implementation (or a certain inability to implement) certain evidence that would significantly outweigh all other evidence.

Therefore, I believe that the most suitable moment to try to settle is immediately after delivery of the response to the lawsuit.

This is the moment when both parties have outlined their formal requests, arguments and evidence for the first time from the beginning of the disputed relations.

It would be useful for this summons to be accompanied by a notification of the consequences of rejecting the invitation, through certain stimulations and/or burdens, such as:

- a refund of a part of the paid costs of the arbitration procedure in the case a settlement is reached;

- an obligation of the party rejecting to attend the settlement hearing to make an arbitration deposit for the costs of the legal representation of the other party for the first main hearing, as a sign that it accepts the future decision that will be based on the arbitration decision instead of a settlement;

- statement that in the case it will respect the constructive decision of the party to accept attending the settlement hearing.

Ultimately, I consider that having a settlement hearing without a record, with the freedom to outline all claims is very important for the arbitrators themselves, even if no settlement solution is achieved, for the following reason.

At such a hearing, it is necessary to each party to present their real interests and views of the dispute, and which are not visible in the proposed evidence and formals claims of the lawsuit and response to the lawsuit. I believe that this is helpful for arbitrators in assessing which evidence will be allowed in the case and how it will be assessed.

Ad b) Own delivery

It is well known that one of the most frequent causes of slowness of the procedure is the delivery of summons and letters.

Keeping in mind the right for arbitration to be more flexible than regular courts, I believe that arbitration should take advantage of its position in comparison to regular courts in exactly this area.

The term “own delivery” implies the transfer of authority, and above all responsibility, for successful delivery to the parties themselves.

By this, “own delivery” pertains to:

- deliveries of letters between parties
- deliveries of letters, summons, party requests to arbitration and third persons
- delivery of summons to witnesses and third persons to be heard.

The only delivery that would remain the obligation and responsibility of arbitration would be that to court experts and the parties themselves.

Mutual delivery has been regulated in part to date, and I believe that it can be amended only in the way that it be explicitly stated that an unsigned return slip shall have the significance of a proper and timely delivery, if its attempted delivery was made at least 7 days prior to the hearing.

Furthermore, each part has its own obligation and risk to deliver the summons to the witness it proposed and which was accepted as proposed evidence.

Non-attendance of a witness can only be justified by the party once, with an original medical document, and each following case of non-attendance, for any reason, is assessed as “evidence that cannot be implemented” and goes against the party proposing that witness.

Non-attendance of the party representative as a witness shall immediately be assessed, without an analysis of the reason, as “evidence that cannot be implemented” and goes against the party.

Non-attendance of the party's representation shall always go against the party, without analysis of the reason, and the hearing shall be carried out without that party's representation.

The inability of a party to obtain a certain document from a third person shall always go against the party and is not a reason for postponing the hearing, but shall also be considered “evidence that cannot be implemented”.

The address of the party is exclusively the address of the party representation or the party itself if it has no representation listed in the petition. Therefore, a difference official address of the party seat is irrelevant.

Delivery from the arbitration to the parties shall also be deemed proper if a return slip is returned, even if it is unsigned.

Each hearing, with the exception of the first hearing, is scheduled via the record from the previous hearing, independent of the necessary actions between the two hearings.

The implementation of actions between the two hearings is exclusively the risk of the parties themselves, except that pertaining to the drafting of expert opinions.

In the manner described above, I believe that this would completely resolve the issues of reasons for postponing hearings.

Ad c) Preclusion of evidence

The third additional rule that parties would be informed about in the form of a decision is the loss of the right to admit further evidence after the filing of a lawsuit, or the response to the lawsuit.

An exception to the above rule is the condition that the party may justify the proposal of new evidence only if it was not able to submit that evidence during the phase of the lawsuit or response to the lawsuit, but no later than at the first main hearing.

However, the justification of the plaintiff to propose new evidence is not, for example, a claim by the defendant from the response to the lawsuit, and for which facts the plaintiff could have known without the response of the defendant.

It is the task of the first main hearing to establish whether the possible state of the case is mature for conclusion and, if it is not, the exclusive decision as to which evidence will be admitted.

After the decision is made as to which evidence will be admitted at the first main hearing, it is no longer possible to propose new evidence, even with the above stated exception.

This implies that arbitration itself does not bring evidence that was not proposed, that is, it is the risk of the parties themselves as to the type and scope of evidence that will be admitted.

This then withdraws the exception that the party causing the postponement of the hearing due to new evidence bears the cost by the principle of guilt, considering that the principle of a fast procedure is more valuable that the monetary satisfaction of the other party for the cost of a single hearing.

4. Conclusions

I am certain that the above rules would not impinge upon the rights of the parties, primarily because the parties are equals, and the condition is that they were both acquainted with these rules in a proper and timely manner.

Additionally, I am convinced that these three segments of the procedure account for 90% of the reasons for postponement and holding up the procedure.

It is possible in individual cases that a party will not succeed in using its evidence, but the rule to this effect would not be biased, again, because they are equally valid for both parties.

It is possible that some decisions would be made pursuant to very little admitted evidence, however, this does not meet that this is unjust to the parties, as the amount of evidence depends primarily on the parties.

On the other hand, the majority of commercial relations rest on the principle that deals are won or lost depending on actual capabilities, and commercial entities accept that as fair game, as a reality of business.

It is a notorious fact that business today is incomparably faster than just 20 years ago.

It is therefore a reasonable conclusion that “business”, i.e. the execution of the arbitration procedure should also be incomparably faster than 20 years ago.

Concretely, with the application of the above addition rules, an average of 3 hearings would be held in a case, over a period of 3–6 months.

If these would prove to be “standard procedures”, then every conscientious entrepreneur would be certain as to whether it make sense to carry through and wait for a verdict with dealing with a legal case.

Therefore, I believe that the arbitration procedure has the right (and responsibility) to be carried out according to the same principles used by orderly market entities.

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